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In the Supreme Court of the United States

OCTOBER TERM, 1988

SIMKINS INDUSTRIES, INC., PETITIONER

v.

SIERRA CLUB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
ANNE S. ALMY
AMELIA S. SALZMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 505 of the Clean Water Act, 33 U.S.C. 1365, which allows a private citizen to bring a civil action to enforce the Act's effluent limitations and to seek imposition of appropriate civil penalties, violates Article III's standing requirement.

2. Whether the court of appeals erred in concluding that petitioner was in violation of the Clean Water Act.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Simkins Industries, Inc., operates a paper mill in Catonsville, Maryland. Pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the State of Maryland issued Simkins a permit that allows the company to discharge waste water into the Patapsco River. Respondent Sierra Club determined that Simkins was in violation of its permit requirements and commenced this action for injunctive relief and civil penalties under the Clean Water Act's citizen enforcement provisions. 33 U.S.C. 1365(a)(1). The district court concluded that Simkins had violated its permit requirements and assessed a civil penalty of $977,000. The court of appeals affirmed that judgment.[1]

[1] After this suit was filed, Congress enacted the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, which extensively amended the Clean Water Act. The amendments have not yet been incorporated into the official version of the United States Code. All references to 33 U.S.C. shall be to 33 U.S.C. as amended by the Water Quality Act.

1. Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). This Court's decision in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376 (1987), describes the Act's enforcement mechanisms. Section 301(a) prohibits the discharge of any pollutant into navigable waters except as authorized by other specific sections of the Act. 33 U.S.C. 1311(a). Section 402 establishes the National Pollutant Discharge Elimination System (NPDES) and authorizes the Environmental Protection Agency (EPA) or a State that has instituted an EPA-approved permitting program to issue permits allowing the discharge of pollutants. 33 U.S.C. 1342.

NPDES permits typically require the permittee to meet specific quantitative effluent parameters based on daily and monthly averages. They also impose self-monitoring and information reporting requirements. See 33 U.S.C. 1318(a)(4)(A), 1342(a)(1) and (2). EPA has promulgated regulations identifying conditions applicable to all NPDES permits. See 40 C.F.R. 122.41, 123.25. The regulations provide that a permittee must comply with the permit (40 C.F.R. 122.41(a)), retain records of all monitoring information for at least three years (40 C.F.R. 122.41(j)), and disclose monitoring results in discharge monitoring reports (DMRs) (40 C.F.R. 122.41(l)). DMRs are generally available to the public. See 33 U.S.C. 1318(b).

Section 309 of the Clean Water Act provides that a violation of any condition of an NPDES permit constitutes a violation of the Act. See 33 U.S.C. 1319(a). Section 309 further provides that the EPA may correct permit violations by issuing administrative compliance orders and imposing administrative civil penalties (33 U.S.C. 1319(a) and (g)), by requesting the Attorney General to bring civil actions for injunctions or civil penalties (33 U.S.C. 1319(b) and (d)), or by seeking criminal sanctions (33 U.S.C. 1319(c)). The States that are authorized to issue NPDES permits may seek or impose similar sanctions in accordance with state law. See 33 U.S.C. 1342(b)(7). The permittee's DMRs generally are admissible as evidence of permit

violations. See, *e.g.*, *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987).

Section 505 of the Clean Water Act further declares that, in the absence of federal and state enforcement, a private citizen may commence a civil action against any person "alleged to be in violation of" the conditions of its NPDES permit (33 U.S.C. 1365(a)), provided that—among other requirements—the citizen has "an interest which is or may be adversely affected" (33 U.S.C. 1365(g)). In *Gwaltney*, this Court concluded that Section 505 does not allow a private person to commence a citizen suit based on a wholly past violation; instead, his complaint must contain "a good-faith allegation of continuous or intermittent violation." 108 S. Ct. at 385. If a citizen prevails in his action, Section 505 specifically authorizes district courts to enforce the permit requirements and to impose appropriate civil penalties under Section 309(d), which are payable only to the United States Treasury. 33 U.S.C. 1365(a). See *Gwaltney*, 108 S. Ct. at 379, 383; *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14 n.25 (1981).

2. On August 31, 1984, the Sierra Club notified Simkins, the Administrator of EPA, and the Maryland State Department of Health and Mental Hygiene of its intention to commence a Clean Water Act citizen suit against Simkins. Pet. App. 76a-79a.[2] The notice alleged that Simkins "has violated and continues to violate 'an effluent standard or limitation' under Section 505(a)(1)(A) of the Act" by failing to comply with its state-issued NPDES permit. Pet. App. 76a. The notice specifically alleged that for a period of 32 months, extending from August 1, 1981, to March 31, 1984, Simkins violated its permit by failing to file required DMRs. *Id.* at 76a-78a.

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[2] Section 505 generally requires a person to provide 60 days' notice of his intent to sue and prohibits the person from bringing a citizen suit if the EPA or a State is diligently prosecuting a compliance action. 33 U.S.C. 1365(b). This Court recently granted a petition for a writ of certiorari to determine whether a citizen's failure to comply with a similar 60-day notice requirement contained in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972(b)(1), requires dismissal of the action. See *Hallstrom* v. *Tillamook County*, cert. granted, No. 88-42 (Mar. 20, 1989).

Sixty-one days later, the Sierra Club commenced its citizen suit against Simkins. See Pet. App. 71a-75a. The Sierra Club's complaint alleged that the interests of the organization's members "have been, are being and will be adversely affected by the failure of Defendant, Simkins Industries, Inc., to comply with its NPDES permit requirements" (*id.* at 73a). It further alleged that Simkins "has violated its waste water discharge limits contained in its NPDES permit, as set forth in a letter to the Defendant dated August 31, 1984, attached hereto as Exhibit A and incorporated by reference herein" (*id.* at 74a). Sierra Club requested the district court to declare Simkins to have violated the Clean Water Act, to enjoin Simkins from operating its plant "in such a manner as will result in further violation of Defendant's NPDES permit," to require Simkins to provide the Sierra Club with a copy of all future DMRs, and to assess civil penalties and attorneys' fees (*id.* at 74a-75a).

Simkins moved for entry of judgment on the pleadings, contending: (1) the Sierra Club's members are not injured by Simkins' failure to file DMRs; (2) the complaint failed to state a claim because it did not allege a violation of an effluent standard or limitation; (3) the action was foreclosed by Simkins' prompt corrective action; and (4) because Simkins had begun to submit DMRs, the request for injunctive relief was moot and the court, therefore, could not assess civil penalties. C.A. App. 33-34. Shortly thereafter, the Sierra Club moved for partial summary judgment on the ground that there is no genuine issue of fact concerning whether Simkins had violated the Clean Water Act. *Id.* at 68.

The district court denied Simkins' motion for judgment on the pleadings and granted the Sierra Club's motion for partial summary judgment. Pet. App. 37a-41a. The court first concluded that the Sierra Club had standing to bring the action (*id.* at 38a-39a) based on an affidavit that the organization had submitted at argument on the motions (C.A. App. 85).[3] The court

[3] The affidavit consisted of the sworn testimony of John Railey, one of the Sierra Club's members, stating in relevant part:

> My interest, use or enjoyment of the Patapsco River and surrounding area includes preserving the health, safety and welfare of the river basin,

further concluded that Simkins had repeatedly violated the Clean Water Act by its admitted failure to file DMRs and that the Sierra Club could maintain a suit based on past violations (Pet. App. 39a). The court acknowledged a prior decision dismissing a citizen suit based on a past violation (*ibid.*, citing *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985)). But the court read that case "to stand for the proposition that a court lacks jurisdiction to impose penalties for a *single* past violation ended long before the filing of the suit" (Pet. App. 39a). It found that here the "defendant is not a one-time violator of the Act but a multiple violator of its NPDES permit" (*id.* at 40a). The court observed that Simkins "has admitted that it failed to file DMRs as required by its permit" (*ibid.*) and concluded that "[s]ummary judgment as to liability is therefore appropriate" (*id.* at 41a). The court subsequently conducted a bench trial on the appropriate remedy, and entered a memorandum opinion and order reaffirming its prior order of partial summary judgment, assessing a civil penalty against Simkins of $977,000, and granting the Sierra Club an award of attorneys' fees. *Id.* at 42a-57a. In calculating an appropriate civil penalty, the court observed that Simkins had failed to file DMRs during the 977-day period set forth in the Sierra Club's complaint and that the Clean Water Act authorized a penalty of up to $10,000 per day. *Id.* at 55a.[4] The court assessed a penalty of $1,000 per day, concluding that "this assessment will serve as a sufficient deterrent, will adequately

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preserving marine life and water integrity within the river, and eliminating odorous and unsightly illegal pollution. I regularly hike along the river. My activities and interests with respect to the Patapsco River have been adversely affected physically, aesthetically and emotionally by Simkin's [*sic*] Industries' failure to comply with its NPDES permit and resulting illegal pollution.

Finally, I have an interest in monitoring the discharge of effluents into the Patapsco River.

C.A. App. 112.

[4] The Water Quality Act of 1987 amended the Clean Water Act's civil penalty provisions to increase the maximum penalty to $25,000 per day. See § 313, 101 Stat. 45.

compensate for defendant's past actions, and will protect the interests of all the parties" (*ibid.*).[5]

The court subsequently rejected Simkins' motion for reconsideration and other post-trial relief (Pet. App. 58a-67a). Simkins then appealed, contending, *inter alia*, that Sierra Club lacked standing under Article III of the Constitution to seek assessment of civil penalties payable to the U.S. Treasury and that the district court erred in assessing civil penalties for purely past violations. See Pet. 7. The court of appeals postponed resolution of the matter pending this Court's decision in *Gwaltney* and thereafter affirmed the district court's decision. Pet. App. 1a-17a.

The court of appeals first held that the Sierra Club had met Article III's requirement that a plaintiff allege an injury fairly traceable to the alleged wrongdoing and likely to be redressed by a favorable decision. Pet. App. 5a-8a. The court concluded that the Sierra Club had adequately demonstrated, through the affidavit submitted to the district court (see note 3, *supra*), that Simkins' violations injured the organization's members. Pet. App. 6a-7a. The court further concluded that the judicial remedy—imposition of civil penalties—would redress that injury by deterring future violations. Pet. App. 7a-8a.

The court then addressed whether the district court's statement that a citizen may maintain a suit based on past violations

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[5] The Sierra Club's complaint had included a request that the court "[e]njoin defendant from operating its hazardous waste treatment plant [*sic*] * * * in such a manner as will result in further violation of Defendant's NPDES permit" (Pet. App. 75a). The Sierra Club apparently did not seek that relief at trial. See C.A. App. 140-145 (opening statement); *id.* at 253-270, 296-301 (excerpts of closing argument); *id.* at 359-374 (proposed findings of fact and conclusions of law). The Sierra Club instead requested that the civil penalties be paid to the State of Maryland for "cleaning up the Chesapeake Bay and its estuaries" and that the assessment include a sum of approximately $52,000 to conduct a survey to determine pollution levels in the river bed sediment. *Id.* at 373 & n.2; see also *id.* at 143-144, 153-154, 172-177, 267-268. The district court noted testimony concerning the need for an environmental survey (Pet. App. 51a-52a); but the court's order gave no directions concerning where the civil penalties would be paid or how they would be used (*id.* at 57a). See also *id.* at 2a-3a n.1.

required reversal in light of this Court's decision in *Gwaltney*, which prohibited citizen suits based upon wholly past violations. Pet. App. 8a. The court of appeals determined, based on the district court record and the parties' supplemental memoranda, that "Sierra Club has alleged in good faith and proved a continuing violation within the meaning of *Gwaltney*" (*id.* at 9a). The court interpreted the complaint as alleging an ongoing violation (*ibid.*) and further concluded that Simkins' inability at the time of suit to submit a complete DMR and to produce required records of past monitoring established an ongoing state of noncompliance (*id.* at 9a-11a).

The court of appeals rejected Simkins' other arguments (Pet. App. 12a-17a) and later denied the company's petition for rehearing and suggestion for rehearing en banc (*id.* at 69a-70a).

DISCUSSION

Simkins seeks review of the court of appeals' decision on two grounds. Simkins first contends that "Section 505 of the Clean Water Act abridges the Article III requirement of 'redressability' by authorizing private citizens to seek a judicial award of penalties to the United States Treasury" (Pet. 10). Simkins next argues that the court of appeals erred in concluding that the Sierra Club had alleged and proved that Simkins was in continuing violation of its NPDES discharge permit. Neither argument presents an issue warranting this Court's review. Simkins' first argument rests largely on a mistaken understanding of the relationship between this Court's standing decisions and Section 505 of the Clean Water Act. Simkins' second argument, which turns on the record in this case, does not present a question of general applicability or importance. In any event, the court of appeals' resolution of these matters appears basically correct and does not conflict with any decision of this Court or another court of appeals.

1. Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." This Court has defined that limitation through a number of doctrines, including the "standing" requirement, that preserve the "separa-

tion of powers" and " 'the proper—and properly limited—role of the courts in a democratic society.' " *Allen* v. *Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476 (1982).

The standing inquiry includes elements that are compelled by Article III and elements that this Court has adopted in the exercise of prudent judicial self-restraint. See, *e.g.*, *Allen*, 468 U.S. at 750-751; *Valley Forge*, 454 U.S. at 474-475. This Court has described the "core" constitutional element, which directly implements Article III's "case" or "controversy" requirement, as follows:

> A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Allen, 468 U.S. at 751. See *Meese* v. *Keene*, 107 S. Ct. 1862, 1869 (1987); *Valley Forge*, 454 U.S. at 472; *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Congress may not confer standing to sue where the Article III requirement has not been met. See *Gladstone*, 441 U.S. at 100; *Simon*, 426 U.S. at 38-39; *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972). Simkins asserts that Congress has violated that principle in the Clean Water Act by authorizing private plaintiffs to seek assessment of civil penalties.[6]

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[6] Simkins contended below that the Sierra Club had failed to satisfy the Article III requirement that the "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct." *Allen*, 468 U.S. at 751. The Sierra Club's vague and conclusional affidavit (see note 3, *supra*) is arguably insufficient to satisfy that constitutional requirement. Of course, the reporting requirement immediately at issue in the case is not an end in itself, but is a means of assuring compliance with the Act's effluent limitations (which is presumably the Sierra Club's interest). In any event, Simkins has not raised the question of injury-in-fact in its petition, so it is not before this Court. Moreover, that fact-specific issue would not warrant this Court's review.

Simkins acknowledges that Article III's standing requirement does not prevent Congress from authorizing a person to bring a civil action under Section 505 of the Clean Water Act to enjoin ongoing violations of the Act that cause him injury. See Pet. 11-12. Indeed, it is clear beyond dispute that a person who uses a navigable waterway for recreation or other purposes can establish his Article III standing by showing that: (1) he is injured because the ongoing violations interfere with his use of the river; and (2) enjoining the violations will likely redress his injury by forcing the violator to discontinue its injurious conduct. See *Sierra Club* v. *Morton*, 405 U.S. at 734-741.[7]

Simkins contends, however, that Article III standing is lacking when the awarded relief consists only of penalties payable to the Treasury because "[a] citizen who sues on his own behalf for penalties, which he is not entitled to share, cannot demonstrate 'that he personally would benefit in any tangible way from the court's intervention.' " Pet. 11 (quoting *Warth*, 422 U.S. at 508). We disagree. A citizen plaintiff may directly benefit from the imposition of a civil penalty—even if he does not receive the proceeds—because the assessment, like an injunction, deters the violator from continuing the violations that prompted the plaintiff to file the suit. That benefit, which rectifies the plaintiff's injury, is sufficient to satisfy Article III's "redressability" requirement.[8]

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[7] This Court indicated in *Sierra Club* v. *Morton*, *supra*, that Congress may confer standing on persons to assert aesthetic, conservational and recreational interests, provided that "the party seeking review be himself among the injured." 405 U.S. at 734-735, 738. See also *id.* at 741 n.1 (Douglas, J., dissenting) ("no doubt exists that 'injury in fact' to aesthetic' and 'conservational' interests is here sufficiently threatened to satisfy the case-or-controversy clause"); *Data Processing Service* v. *Camp*, 397 U.S. 150, 154 (1970) ("standing may stem from [noneconomic values] as well as from the economic injury on which petitioners rely here").

[8] Contrary to Simkins' repeated assertions (Pet. 10-15), there is no Article III significance in this context to the fact that the civil penalties are payable to the Treasury. If a court attempted to secure compliance through the issuance of an injunction, the court would similarly rely on the threat of monetary penalties payable to the Treasury (in the form of contempt sanctions) to assure that the injunction were obeyed. Thus, the injunctive remedy and the civil

Congress has satisfied Article III by authorizing citizens to secure exactly that type of redress. As this Court explained in *Gwaltney*, Section 505 of the Clean Water Act authorizes private persons to bring judicial actions to compel compliance with the Act. See 108 S. Ct. at 381, 382, 383-384. And, as the Court observed in another private enforcement action, *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), "[a]n injunction is not the only means of ensuring compliance" (*id.* at 314). The Clean Water Act "provides for fines and criminal penalties" (*ibid.*, citing 33 U.S.C. 1319(c) and (d)) and "permits the district court to order that relief it considers necessary to secure prompt compliance with the Act" (456 U.S. at 320).[9]

In the case of citizen suits, the Clean Water Act provides the citizen with both an injunctive remedy and the right to seek "appropriate civil penalties" (33 U.S.C. 1365(a)) as alternative or supplementary methods to induce the violator to abate ongoing violations that interfere with the citizen's use and enjoyment of water resources.[10] Congress has made an empirical judgment

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penalty remedy ultimately rely on the same sort of monetary sanctions to redress the citizen's injury.

[9] This Court recently reiterated that civil penalties under the Clean Water Act are intended, in large part, to deter a violator from committing future violations. See *Tull* v. *United States*, 481 U.S. 412, 422-424 (1987). See also Comment, *The Rise of Citizen-suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 Nw. U.L. Rev. 220, 237-238 (1987). As the Court noted (481 U.S. at 422-423 n.8), Congress, in its recent amendments to the Clean Water Act (Water Quality Act of 1987, § 314(a), 101 Stat. 47), has instructed the courts to consider a number of factors relevant to deterrence—including the seriousness of the violation, the economic benefit resulting from the violation, any good faith efforts to comply, and the economic impact of the penalty on the violator—in determining the amount of the civil penalty. See 33 U.S.C. 1319(d).

[10] Simkins seems to concede that, even under its theory, there would be no Article III difficulty in this case if the district court had issued an injunction in addition to assessing civil penalties. See Pet. 16. But the issuance of an injunction is not an Article III or statutory prerequisite, provided that the citizen can show injury and the need for relief. As *Gwaltney* observed, the citizen suit provision "suggests a connection between injunctive relief and civil penalties" (108 S. Ct. at 382) because both remedies are designed to rectify the violator's state of noncompliance. See *ibid.* (a citizen "may seek civil penalties only in a

that a citizen who can show injury can obtain effective redress through the imposition of civil penalties that induce a violator to achieve and to maintain a state of compliance. That quintessentially legislative determination is reasonable and entitled to respect. Cf. *Sierra Club* v. *Morton*, 405 U.S. at 732 n.3. Indeed, as in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), "if [violators] faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality" (*id.* at 417).

The existence of Article III standing here is also consistent with this Court's discussion in *Gwaltney* of the related Article III concept of mootness. As this Court explained, a defendant may seek dismissal of a citizen abatement action on mootness grounds, if prior to a judicial finding of noncompliance, the defendant eliminates all prospect that the violations will recur. See 108 S. Ct. at 386. But the defendant bears the heavy burden of demonstrating "that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur' " (*ibid.*). In other words, a citizen plaintiff has a live Article III "case" or "controversy" provided that he continues to face a possibility of remediable injury. Those are essentially the same circumstances in which, we submit, the plaintiff would have Article III standing to seek imposition of civil penalties.[11]

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suit brought to enjoin *or otherwise abate* an ongoing violation" (emphasis added)).

[11] As this Court has recognized, the mere cessation of illegal conduct after the institution of a suit does not make the case moot, even if "the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary." *United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 203-204 (1968). See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633, 635-636 (1953). In the case of Clean Water Act citizen suits, the commencement of compliance, even if accompanied by the initiation of new procedures or the installation of new equipment, would not, as a general matter, completely moot a case because, for example, the same neglectful behavior that led to the violations may still recur in the form of neglectful adherence to the new procedures or neglectful operation and maintenance of the new equipment. Accordingly, we submit, a finding of mootness would generally be inappropriate absent a showing that the prospect of neglectful behavior itself is eliminated by, for ex-

Nor is Simkins persuasive in contending that the "deterrence rationale is incompatible with Article III precedents" (Pet. 17-18). Simkins primarily argues that a citizen cannot assert Article III standing based on his supposed interest in encouraging potential violators, who are not parties to the suit, to comply with the Act (*id.* at 17-19). That may well be true, but the Court has no occasion to reach that particular constitutional question here. Neither the court of appeals nor the district court based the imposition of the civil penalty solely on "general" deterrence.[12] Moreover, the Court may never need to reach that constitutional question because the Clean Water Act's statutory provisions do not appear to authorize citizen suits brought solely for "general" deterrence.[13]

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ample, the permanent closing of the facility or the permanent cessation of all discharges. See, *e.g.*, *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), cert. denied, 108 S. Ct. 484 (1987) (defendant completed tie-in with a municipal treatment facility and ceased discharging under its NPDES permit). In the absence of such a showing, Article III standing would continue as well.

[12] As Simkins observes (Pet. 16-17), the court of appeals cited approvingly (Pet. App. 8a) a pre-*Gwaltney* district court decision suggesting that a citizen plaintiff's interest in general deterrence could satisfy Article III's standing requirements. See *Student Public Interest Research Group, Inc.* v. *AT&T Bell Laboratories*, 617 F. Supp. 1190, 1200-1201 (D. N.J. 1985). That rationale was not essential to the court of appeals' decision, however, since the court also relied on the concept of "specific" deterrence, stating that the request for civil penalties was "causally connected to a citizen-plaintiff's injury" because "penalties can be an important deterrence against future violations" (Pet. App. 8a). See also *id.* at 8a n.5 (describing Simkins' commencing of compliance). The district court, which made no mention of "general" deterrence and calculated "appropriate civil penalties" (33 U.S.C. 1365(a)) based on factors relevant to deterring *Simkins'* continued violations (such as the gravity of Simkins' violations, the company's financial status, the economic benefits from noncompliance, and the company's past and present conduct), appeared to rely exclusively on a "specific" deterrence rationale. See Pet. App. 55a; see generally *id.* at 45a-55a.

[13] As we have explained, Section 505(g) defines a citizen as a person who has "an interest which is or may be affected" (33 U.S.C. 1365(g)). "It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in

Simkins acknowledges the Sierra Club's contention that a civil penalty would specifically "deter Simkins" from violating its permit (Pet. Reply Br. 2), but it does not respond to that argument except to say that "judicial relief which serves no conceivable interest apart from its raw potential for deterrence" does not satisfy Article III (*id.* at 4). As we have explained, a citizen obtains Article III "redress" because the penalty abates ongoing violations by inducing the violator to achieve and to maintain a state of compliance. Indeed, the district court's assessment of a civil penalty against Simkins seems to have achieved exactly that result in this case.[14]

In short, Simkins is mistaken in suggesting that Section 505's civil penalty provisions present a question of "fundamental constitutional magnitude" (Pet. 11). Those provisions satisfy constitutional standing requirements because they provide citizen plaintiffs with a remedy to abate specific injurious violations. Nor does the court of appeals' particular application of those

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Sierra Club v. *Morton*, 405 U.S. 727 (1972)." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). The *Sierra Club* decision, which interpreted the Administrative Procedure Act's standing requirements, held that a person asserting aesthetic or recreational interests in a public resource must show that his actual use of the resource would be significantly affected. See 405 U.S. at 734-736. It unequivocally rejected the notion that a person might assert standing simply as a " 'representative of the public' " (405 U.S. at 736).

[14] Simkins mistakenly reads the United States' *amicus curiae* brief in *Gwaltney* as supporting its view that citizen plaintiffs lack standing to seek civil penalties. Pet. 15-16. The United States' brief urged (as this Court later held) that Section 505 requires a citizen plaintiff to allege ongoing noncompliance with the Clean Water Act's requirements. The brief suggested that, given Section 505's goal of abating water pollution, an action brought "simply to obtain a judicial assessment of civil penalties for *nonrecurring past violations* would fail to meet Article III's requirements," because the payment of civil penalties to the Treasury for those violations would not "redress in any meaningful sense the citizen's alleged injuries." 86-473 U.S. Br. 21 n.34 (emphasis added). Obviously, the United States' concern regarding standing was limited to the situation where the citizen plaintiff did not face any prospect of future injury. Indeed, it was implicit in our submission that a citizen plaintiff who *did* allege ongoing noncompliance could satisfy Article III's standing requirement.

provisions in this case warrant this Court's review. First, as we have explained, the court of appeals' decision is basically correct. Moreover, this Court's decision in *Gwaltney* has already provided significant guidance on the subject, and there is at this time no conflict among the courts of appeals to be addressed.[15]

2. Simkins also contends (Pet. 20-28) that this Court should review the court of appeals' conclusion that the company was subject to civil penalties, in accordance with this Court's decision in *Gwaltney*, based on Simkins' ongoing state of noncompliance. Simkins essentially argues that the court of appeals erred in affirming the district court's judgment on grounds other than those advanced by that court. We submit, however, that the court of appeals acted within its powers and did not abuse its discretion. Moreover, this matter, which does not present a substantial or novel legal question and turns on an assessment of the particular record in this case, does not present any issue warranting this Court's review.

As this Court has explained, a reviewing court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984). See, *e.g.*, *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937); *Langnes* v. *Green*, 282 U.S. 531, 538-539 (1931); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435-436 (1924). The courts of appeals uniformly follow that practice. See 6 J. Moore, *Moore's Federal Practice* ¶ 56.27[1], at 56-858-859 (1988); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716, at 658-660 (1983) (collecting cases).[16]

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[15] As Simkins itself points out, although citizen plaintiffs have brought a substantial number of citizen suits in recent years (Pet. 13), "only twice has a penalty judgment in a § 505 suit been subjected to appellate review" (*id.* at 15). "Both cases"—*Gwaltney* and this dispute—"were decided by the Fourth Circuit in panel opinions by [former] Chief Judge Winter" (*ibid.*).

[16] Simkins mistakenly disagrees with this well-settled principle, relying on this Court's per curiam decision in *Fountain* v. *Filson*, 336 U.S. 681 (1949). See Pet. 23. *Fountain* involved a distinctly different situation. There, the court of appeals had *reversed* the district court's summary judgment and entered summary judgment in favor of the appellant. See 336 U.S. at 682. See also 6 J.

The court of appeals properly followed settled practice in this case. As the court explained,

> In *Gwaltney*, the Supreme Court held that citizen-suits could not be based upon wholly past violations, but distinguished wholly past violations from allegations of intermittent or sporadic violations. On remand from the Supreme Court, we have ruled that while the Supreme Court held that good faith allegations were sufficient to meet threshold jurisdictional challenges, the Supreme Court also stated that in order to prevail, a citizen-plaintiff must prove a continuing violation.

Pet. App. 9a (citing *Chesapeake Bay Foundation, Inc.* v. *Gwaltney of Smithfield, Ltd.*, 844 F.2d 170 (4th Cir. 1988)).[17] The court of appeals therefore found it necessary to evaluate the district court's pre-*Gwaltney* decision in light of this Court's and its own intervening decisions. The court concluded that, although the district court believed that Section 505 permitted imposition of civil penalties based on a series of past violations, affirmance was nevertheless warranted because the record demonstrated that the "Sierra Club has alleged in good faith and

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Moore, *Moore's Federal Practice* ¶ 56.27[2] (1988). Simkins also contends that the court of appeals' decision in the present case amounts to impermissible appellate factfinding, citing *Amadeo* v. *Zant*, 108 S. Ct. 1771, 1780 (1988); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986); *Anderson* v. *Bessemer City*, 470 U.S. 564, 577 (1985); and *Pullman-Standard* v. *Swint*, 456 U.S. 273, 286-287 (1982). See Pet. 23-26. But all of those cases involved situations where the court of appeals had overturned the district court's findings and reversed its judgment – neither of which occurred here.

[17] The Fourth Circuit's *Gwaltney* decision specifically stated that such proof could be made by either (1) proving that the violation had actually continued after the filing of the complaint, or (2) "adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." 844 F.2d at 171-172. Accord *Sierra Club* v. *Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988). The court of appeals remanded *Gwaltney* to the district court to determine whether plaintiffs had proved their allegations. The district court has since determined that the plaintiffs had met their burden of proof (688 F. Supp. 1078 (E.D. Va. 1988)). The case is once again on appeal before the Fourth Circuit (No. 88-1317).

proved a continuing violation within the meaning of *Gwaltney*" (Pet. App. 9a).

The court of appeals' assessment of the record involved no rejection of any finding by the district court and appears correct. First, there can be little doubt that the complaint alleged an ongoing violation. As the court of appeals explained (Pet. App. 9a), the Sierra Club's 60-day notice letter announcing its intention to sue unambiguously alleged that Simkins "has violated and continues to violate" its NPDES permit (*id.* at 76a). The complaint, in turn, specifically incorporated that letter by reference (*id.* at 74a). In addition, the complaint specifically stated that "[t]he interests of Sierra Club's members have been, *are being and will be* adversely affected by" Simkins' violations (*id.* at 73a), and it sought an injunction against Simkins' "further" violation, as well as copies of all Simkins' "future" reports relating to its permit (*id.* at 75a). Given these allegations and requests for relief, the court of appeals properly concluded that the Sierra Club's complaint, read in its entirety, alleged an ongoing state of noncompliance. See *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957).

The court of appeals' conclusion that the Sierra Club had proved an ongoing state of noncompliance also finds adequate support in the record. As the court explained, although Simkins apparently initiated actions to come into compliance shortly after the Sierra Club gave notice of its intention to sue (Pet. App. 8a n.5), it did not file its first legally sufficient DMR until nearly three months after the Sierra Club filed its complaint (*id.* at 10a). The court reasonably concluded from the record, which showed that Simkins had blatantly ignored its reporting obligations for three years prior to the filing of that DMR, that Sierra Club had proved a continuing violation that justified a judicial remedy to assure future compliance. See *id.* at 9a-11a.[18]

[18] "A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated." *Gwaltney*, 108 S. Ct. at 387 (Scalia, J., concurring). Indeed, the district court itself seemed to apply that principle in granting summary judgment. See Pet. App. 39a (observing that while a citizen plaintiff may not seek penalties "for a

Simkins contends that the court of appeals should have vacated the district court's judgment and remanded for further factual development. The court of appeals certainly had the discretion to do so. And in many – if not most – instances that is perhaps the better course. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). But the court of appeals did not abuse its discretion in affirming the district court's decision here, where the district court first entered its order of partial summary judgment nearly four years ago, Simkins had a full opportunity to address the relevant issues, and the resulting record supported affirmance.[19] In any event, the question whether the court of appeals abused its discretion on this particular record does not present a question of general importance warranting this Court's review.[20]

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single past violation," the violator who "stops polluting the day, the hour, or the minute before the suit is filed" is not necessarily insulated from such relief). In addition to the reporting violations, the court of appeals concluded, based on evidence in the record, that Simkins' failure to retain records as required by its permit also established an ongoing state of noncompliance. See Pet. App. 10a-11a. See generally C.A. App. 15-31 (Simkins' NPDES permit); *id.* at 37-67 (Simkins' DMRs).

[19] Simkins' contention that it did not have an opportunity to tender relevant facts (Pet. 22; Pet. Reply Br. 6) is incorrect. Simkins consistently argued before the district court that it was in present compliance with its permit. See, *e.g.*, Pet. App. 38a; C.A. App. 379-381. It accordingly had a full opportunity to develop a record in support of that assertion.

[20] Simkins has stated that it "reserves the right to argue" an additional matter – namely, whether the failure to file a DMR is a violation of "an effluent standard or limitation" (33 U.S.C. 1365(a)) – in the event that its petition is granted. See Pet. i. Since Simkins has not presented that question as a basis for this Court's review, we do not address it here. See Sup. Ct. R. 21.1(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
ANNE S. ALMY
AMELIA S. SALZMAN
Attorneys

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